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# **James D. Hopkins, An Appreciation**

**Hon. JOHN P. COHALAN, JR.\***

For a period of almost exactly twenty years, from early 1962 until December 31, 1981, James D. (Jim) Hopkins graced the bench at the appellate division, second department. When he went to Brooklyn, he was the eighth justice in the department, having originally been designated by the Governor as a temporary appointee.<sup>1</sup>

Not long after his designation, the Judge acquired permanent status, which he maintained until his retirement. At the time he left the bench, the court had, due to a burgeoning case load, a total of fifteen justices, of whom eight were of "temporary" status. It had also acquired the distinction of being the busiest appellate tribunal in the State of New York, and quite possibly in the entire nation.

The list of cases in which Judge Hopkins participated and in the course of which he wrote majority, concurring and dissenting opinions, is staggering both in numbers and in scope. To cull out and discuss a few of the most important is itself a formidable task.

In his two decades of scholarly production on the appellate bench, he helped to shape the thinking of his colleagues. That he labored in the semi-obscurity of the appellate division rather than in the fierce white light of the court of appeals at Albany, or even in the august chamber of the United States Supreme Court remains something of a mystery. It might be explained in part in that he did not thrust himself forward because he was, to some degree, of a rather reserved nature. He was never one to blow his own horn.

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\* Justice of the Supreme Court of the State of New York, 1963 to present; former Justice of the Appellate Division, Second Judicial Department, from 1974 to 1982.

1. The New York State Constitution makes provision for seven permanent justices in the second department. Upon the request of the court, as many more justices with temporary status may be appointed as are needed. See N.Y. CONST. art. VI, §§ 4(b), 25(b).

Part of the reason for this article is to discuss several of the cases in which he delivered opinions of importance not only to the immediate litigants, but also to the state at large and to the members of the judiciary and the bar as well.

## I. The Cases

### A. *A Question of Both Constitutional Law and of Court Practice*

In *La Rocca v. Lane*,<sup>2</sup> the issues included the right of an attorney employed by the Legal Aid Society to defend a client in a criminal jury case while wearing a clerical collar. La Rocca was a Roman Catholic priest who also happened to be a lawyer. He claimed that he had the right (and that as a duty to his Bishop he was required) to wear the collar at all times while in public. It sounded almost like the arguments advanced by the Big Endians and the Little Endians in *Gulliver's Travels*, the satire of Jonathan Swift. There the argument revolved about which end of an egg should be broken first. Here we have the question of a collar worn facing to the front or to the rear.

Nevertheless, as Judge Hopkins pointed out, there was a constitutional question to be decided involving as it did the first amendment and the separation of church and state. The secondary issue concerned the right of the court, as a matter of protocol, to regulate the attire of attorneys appearing before it.

Quite logically and dispassionately the judge, writing for the court, with one dissent, ruled that:

[W]e conclude that the plaintiff's right to free exercise of religious belief is subject to reasonable regulation when he appears as an attorney in court to try a case before a jury. Other considerations support this view. The petitioner's right to practice as an attorney is quite different from his right to officiate as a priest. This does not mean that he gives up his religious beliefs or his priestly duties when he acts as an attorney; it does mean, however, that when he enters on secular pursuits, he is subject to reasonable regulations in the secular realm.<sup>3</sup>

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2. 47 A.D.2d 243, 366 N.Y.S.2d 456 (2d Dep't), *aff'd*, 37 N.Y.2d 575, 338 N.E.2d 606, 376 N.Y.S.2d 93 (1975), *cert. denied*, 424 U.S. 968 (1976).

3. *La Rocca v. Lane*, 47 A.D.2d at 248-49, 366 N.Y.S.2d at 461-62.

On the point having to do with the power of the court to regulate the attire of an attorney, the Judge observed that:

The court's power to regulate dress cannot be unreasonably exercised. Whether counsel preferred a bow-tie to a four-in-hand, or a gray suit to a blue, in common experience should have no influence on the conduct of a trial. There are idiosyncrasies which are beyond the power of a court or even the strictures of a book of etiquette to correct. When, nonetheless, a discernible nexus between dress of an attorney and the attainment of a fair trial becomes evident in common experience, the court should take such action as will be reasonably adapted to regulate the dress of the attorney.<sup>4</sup>

The court of appeals, in a six-to-one decision, affirmed the appellate division.<sup>5</sup>

### B. *A Criminal Law Case*

A case that attracted widespread attention among the fraternity of criminal lawyers was that of *People v. Clayton*.<sup>6</sup> It was of particular interest to the writer of this article in that he acted as defense counsel, by assignment, in the trial court.

On November 2, 1952 the body of a fifty-two year old black man was found in a potato house at East Northport in Suffolk County. The potato crop had already been harvested and whoever deposited the body there had every reason to believe that it would lie undiscovered until the following spring. However, by happenstance, it was discovered almost immediately and a search for the perpetrator was begun.

Robert Clayton, a migrant farm worker then twenty-three years of age and a functional illiterate, was first held as a material witness and then, as the presumed culprit, became the target of the investigation. He was grilled by the police authorities and the crime was laid at his door. He made a written confession.

Clayton languished in jail until February 1, 1953, at which time County Court Judge Munder (who later served with distinction with both Judge Hopkins and the writer in the appel-

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4. *Id.* at 252, 366 N.Y.S.2d at 465.

5. *La Rocca v. Lane*, 37 N.Y.2d 575, 338 N.E.2d 606, 376 N.Y.S.2d 93, *cert. denied*, 424 U.S. 968 (1976).

6. 41 A.D.2d 204, 342 N.Y.S.2d 106 (2d Dep't 1973).

late division) assigned the writer and James J. Vaughn as defense counsel. The indictment was for murder in the first degree, which then carried the death penalty.<sup>7</sup> The confession and other items of incriminating evidence were used against Clayton at his trial. The jury returned a verdict of murder in the second degree. He was sentenced by the court to serve thirty years to life. He did not appeal.

In 1965, twelve years after his incarceration, Clayton brought a writ of error coram nobis on the ground, *inter alia*, that his confession was involuntary. County court denied the relief sought, and the appellate division affirmed, as did the court of appeals; the United States Supreme Court denied *certiorari*.<sup>8</sup>

In 1971, eighteen years after his incarceration, Clayton instituted a *habeas corpus* proceeding in the federal district court. There it was decided that his confession was not voluntary; the federal court of appeals affirmed and ordered a retrial within a specified time. *Certiorari* was denied in the United States Supreme Court.<sup>9</sup>

On June 30, 1972, after being released on his own recognizance, as a result of the district court's action on his *habeas corpus* application, Clayton moved to dismiss the indictment, on the ground that he had not been timely brought to retrial as mandated by the United States Court of Appeals. The county

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7. Clayton was charged with first degree murder, which at that time was defined in part as, "[t]he killing of a human being, unless it is excusable or justifiable, is murder in the first degree, when committed: 1. From a deliberate and premeditated design to effect the death of the person killed, or of another. . . ." N.Y. PENAL LAW § 1044(1) (Dennis 1940), *repealed* by 1965 N.Y. LAWS c. 1030 (current version at N.Y. PENAL LAW § 125.27 (McKinney 1975)). Former N.Y. PENAL LAW § 1045 (Dennis 1940) provided: "[m]urder in the first degree is punishable by death, unless the jury recommends life imprisonment. . . ." *Id.*, *repealed* by 1965 N.Y. LAWS c. 1030, § 1 (current version, as amended, at N.Y. PENAL LAW § 60.06 (McKinney 1975) (death penalty imposed for murder in the first degree, as defined in N.Y. PENAL LAW § 125.27, applies only to the limited A-I felonies of murder of a police officer killed in the line of duty, an employee of a state correctional facility killed in the course of performing his official duties, or when the defendant was confined in a state correctional facility upon a life sentence and where the defendant was over eighteen years old at the time of the commission of the crime. N.Y. PENAL LAW § 125.27 (McKinney 1975)).

8. *People v. Clayton*, 28 A.D.2d 543, 279 N.Y.S.2d 605 (2d Dep't 1967), *aff'd*, 22 N.Y.2d 841, 239 N.E.2d 734, 293 N.Y.S.2d 104 (1968), *cert. denied*, 394 U.S. 909 (1969).

9. *United States ex rel. Clayton v. Mancusi*, 326 F. Supp. 1366 (E.D.N.Y. 1971), *aff'd*, 454 F.2d 454 (2d Cir.), *cert. denied sub nom. Montayne v. Clayton*, 406 U.S. 977 (1972).

court dismissed the indictment without a hearing and the District Attorney appealed to the appellate division.<sup>10</sup> Judge Hopkins, in remanding the matter to the county court, said:

The provisions of CPL 210.40 and 210.45 require a hearing when either the prosecution or the defendant moves to dismiss the indictment in the furtherance of justice; and we think that when the court considers *sua sponte* a dismissal for the same reason it should not do so until fair notice of its intention has been given to the parties and a hearing has been held. At the hearing the parties may, if they are so advised, present such evidence and arguments as may be pertinent to the interests of justice. Among the considerations which are applicable to the issue are (a) the nature of the crime, (b) the available evidence of guilt, (c) the prior record of the defendant, (d) the punishment already suffered by the defendant, (e) the purpose and effect of further punishment, (f) any prejudice resulting to the defendant by the passage of time and (g) the impact on the public interest of a dismissal of the indictment.

The sensitive balance between the individual and the State that must be maintained in applying the test of the interests of justice which CPL 210.40 contemplates moves in response to factors largely resting on value judgments of the court. But those judgments in turn hinge on the production of facts in the possession of the prosecution and the defendant. Moreover, the discretion of the court cannot be properly reviewed unless the record discloses the facts upon which the court's judgment was based. On the one side the statute allows an escape from the rigorous rules controlling the dismissal of an indictment only for reasons arising from substantial defects in supporting evidence or required procedure; on the other side, the statute erects the well-considered discretion of the court as a safeguard to prevent a dismissal of the indictment unless the public interests are as fully protected as the individual interests of the defendant for justice and mercy.

It may well be that the County Court will again conclude that the indictment should be dismissed in the furtherance of justice after giving deliberation to what the parties may offer on the remand. Certainly, we do not say that the court cannot reach such a conclusion; and, indeed, the defendant's interest and the

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10. The facts presented are drawn from the appellate division decision, *People v. Clayton*, 41 A.D.2d at 206, 342 N.Y.S.2d at 108.

public interests may coincide to compel that conclusion. All that we now hold is that full opportunity should be afforded to the People and the defendant to provide the court with such evidence and arguments that they deem relevant to the issue.<sup>11</sup>

Eventually Clayton was freed, and from reports, is now gainfully employed.

As a personal prerogative, the writer would like to make two points. There is a footnote in the Hopkins' decision that reads: "The defendant claims that his assigned counsel, contrary to his instructions, failed to file a notice of appeal."<sup>12</sup> Being the trial counsel referred to, I denounce the defendant's statement as a deliberate falsehood. Over the period of three decades the memory of what happened in the Riverhead courtroom on the occasion of the return of the jury verdict is fresh in my mind.

When the jury returned its verdict of murder in the second degree, I was standing on one side of Clayton and Mr. Vaughn was on the other. The defendant said to me, "Does that mean I ain't gonna fry," and I responded, "That means you ain't gonna fry." The District Attorney then walked over to me and said, in the immediate presence of Clayton, "John, are you going to appeal?", and I said, "I see no reason to." At no time then or thereafter did Clayton call upon me to file a notice of appeal, and, of course, *People v. Montgomery*<sup>13</sup> was still sixteen years into the future. *Montgomery* stands for the proposition that it is the duty of the trial lawyer to inform the defeated defendant of his right to appeal. It was probably the *Montgomery* case that jogged Clayton, as a jailhouse lawyer, to raise the question of

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11. *Id.* at 207-08, 342 N.Y.S.2d at 110-11. Even prior to *Clayton*, a hearing was usually required when a court dismissed an indictment *sua sponte*. See N.Y. CRIM. PROC. LAW §§ 210.40, 210.45 (McKinney 1982). Justice Hopkins made it clear, however, that it was necessary to have a specific list of considerations that would be entertained at the hearing. Consequently, with the addition of these factors, the hearing was transformed into a "Clayton" hearing. In *People v. Belge*, 41 N.Y.2d 60, 359 N.E.2d 377, 390 N.Y.S.2d 867 (1976), the court of appeals expressly invited the legislature to include such a specific list of criteria in the statute. In 1979 the provision was amended, and the criteria included by the amendment closely parallel the considerations recommended by Justice Hopkins (see *People v. Clayton*, 41 A.D.2d at 207-08, 342 N.Y.S.2d at 110-11), who is recognized by the Practice Commentary to the Criminal Procedure Law § 210.40 as setting the groundwork for the amendment. See N.Y. CRIM. PROC. LAW § 210.40, commentary at 155-58 (McKinney 1982).

12. *People v. Clayton*, 41 A.D.2d at 205 n.1, 342 N.Y.S.2d at 107 n.1.

13. *People v. Montgomery*, 24 N.Y.2d 130, 247 N.E.2d 130, 299 N.Y.S.2d 156 (1969).

appeal. Further, by the very statement of the District Attorney, Clayton was apprised of his right to appeal.

One might gather from reading the various decisions that were handed down in the *Clayton* matter that he was an innocent man, grievously wronged as a result of the People's action. Nothing could be further from the truth. Weep not for Robert Clayton. He committed a cold blooded murder with an axe to steal money from his victim for the benefit of himself and his paramour. There was no justification whatever for the crime.

*C. A Declaratory Judgment Action Involving a Question of Jurisdiction*

In *Carr v. Carr*,<sup>14</sup> our Judge wrote for a unanimous court in a declaratory judgment action. Special term had granted the motion of the California defendant, Barbara Carr (the second wife of Paul Carr, who died a resident of California on December 17, 1975) to dismiss the complaint of Ann E. Carr, the first wife, for lack of *in rem* jurisdiction and lack of personal jurisdiction of the defendant.

Ann Carr married Paul on November 16, 1956 in Nevada, and lived with him in various countries during his employment in the United States Foreign Service. Because of his allegedly cruel treatment, she left him in 1965 and established her domicile in New York City. In February of 1967, Paul Carr obtained an *ex parte* Honduran divorce on the ground of abandonment.<sup>15</sup>

Based on the argument that the marital *res* followed the domicile of the plaintiff, Ann Carr, and that if Carr were still living at the time, she could have commenced her suit in New York State for a declaration that she was still his wife, the order dismissing the complaint was reversed and the defendant's motion was denied.<sup>16</sup> Although the court of appeals reversed the appellate division, Chief Judge Breitel and Judge Wachtler took occasion to remark that:

We dissent and vote to affirm on the opinion of Mr. Justice James

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14. *Carr v. Carr*, 60 A.D.2d 63, 400 N.Y.S.2d 105 (2d Dep't 1977), *rev'd*, 46 N.Y.2d 270, 385 N.E.2d 1234, 413 N.Y.S.2d 305 (1978).

15. The facts presented are drawn from the appellate division decision. *Carr v. Carr*, 60 A.D.2d at 65-66, 400 N.Y.S.2d at 107.

16. *Id.* at 69, 400 N.Y.S.2d at 109.



D. Hopkins at the Appellate Division in which the concededly difficult problem in this case is elaborated with a keen sense for the legal and policy reasons for the result. We endorse the analysis and it would be supererogation to substitute an elaboration for that of Mr. Justice Hopkins.<sup>17</sup>

#### D. *The Right to an Administrative Hearing*

In *Economico v. Village of Pelham*,<sup>18</sup> plaintiff, a police officer, became disabled on January 27, 1976 as the result of a nonservice-connected automobile accident. He went on sick leave, with pay. On October 25, 1976 he was ordered by the Chief of Police to report for work. He refused, on the ground that he was still physically unfit for duty. For eighteen months he continued to collect his salary, while the village sought in vain to remove him to make way for an able-bodied person in his place. The battle raged about *Economico's* right to a pre-termination hearing. When he was ultimately removed without a hearing, he commenced an Article 78 proceeding for reinstatement, claiming a denial of due process and the violation of the bargaining agreement which entitled him to unlimited sick leave.

The appellate division, by a three-to-one vote, confirmed his dismissal.<sup>19</sup> In dissent, Judge Hopkins wrote:

Once having been appointed to his position and obtaining tenure (Civil Service Law, §§ 58, 63), the petitioner held a property interest. That property interest was the right of an individual to enjoy a privilege recognized as essential to the orderly pursuit of happiness by free men.

. . . .  
Section 73 of the Civil Service Law, permitting the termination of employment status after a continuous absence from duty for a year or more arising from disability, makes no provision for a hearing and the petitioner was not given a hearing before he was separated from his employment. We must read into the provisions of the statute the requirement of a hearing in order to save it from a declaration of unconstitutionality, if the Statute is

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17. 46 N.Y.2d 270, 274, 385 N.E.2d 1234, 1237, 413 N.Y.S.2d 305, 308 (1978) (Breitel, C.J. and Wachtler, J., dissenting).

18. *Economico v. Village of Pelham*, 67 A.D. 272, 415 N.Y.S.2d 239 (2d Dep't 1977), *aff'd*, 50 N.Y.2d 120, 405 N.E.2d, 694, 428 N.Y.S.2d 213 (1980).

19. *Economico v. Village of Pelham*, 67 A.D.2d at 280, 415 N.Y.S.2d at 245.

otherwise constitutional.

In my view the statute is not unconstitutional when the requirement of a hearing is impliedly read into its provision. A municipality should not be forced to retain indefinitely in its employment one who cannot discharge his duties, and it may well become difficult, if not impossible, to find a qualified substitute to fill the void in the roster. At the same time, however, neither should the disabled employee be deprived of his position without the opportunity of being heard.<sup>20</sup>

Justice Hopkins further stated:

The private interest of the petitioner is substantial. Outside of the liberty of the individual and the provisions and security of his home and shelter, I can think of no interest greater than the right to pursue and enjoy a livelihood. The subsistence of the individual depends largely on the fruits of his labor, and the deprivation of his livelihood strikes at the roots of his dignity and integrity.

The risk of an erroneous decision is less under the circumstances than in the instance of charges leading to disciplinary measures under section 75 of the Civil Service Law. The need to establish the factual foundation for action under section 73 of the Civil Service Law is much less stringent - the absence for the required period due to disability is the factual pattern contemplated by the statute. Thus, an evidentiary hearing would not be necessary. That does not mean that an opportunity for a simple hearing should not be afforded. Even though the municipal board or officer may have the power to terminate the employee's status, the employee may be able to persuade them that such action should not be taken, or should be deferred.<sup>21</sup>

He concluded that:

Hence, the provisions for a simple hearing before action is taken under section 73 of the Civil Service Law should be read into the statute in order to preserve its constitutionality.

We cannot now speculate what a hearing may produce to benefit the petitioner; it is enough that the petitioner must be accorded his day before the village is empowered to act. The

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20. *Id.* at 280-81, 415 N.Y.S.2d at 245-46 (Hopkins, J., dissenting) (citations and footnote omitted).

21. *Id.* at 282, 415 N.Y.S.2d at 246 (Hopkins, J., dissenting) (citation omitted).

judgment should therefore be affirmed.<sup>22</sup>

Unfortunately, Judge Hopkins' arguments were unavailing. The court of appeals affirmed.<sup>23</sup>

### E. *Negligence - Proximate Cause - Foreseeability*

In *Pagan v. Goldberger*,<sup>24</sup> a three-year old child, living with his parents and several siblings in a leased apartment owned by the defendant, fell against a sharp metal top of a radiator from which the adjuster or knob had been removed. The landlord had been given actual notice some five months before the accident but the condition was not remedied. Trial term dismissed the complaint at the end of plaintiff's case on the grounds of lack of proximate cause and lack of foreseeability. In reversing and granting a new trial Judge Hopkins, speaking for the court, noted that:

Negligence as a legal concept traditionally includes both proximate cause and foreseeability as tests of liability. The common law recognizes fault as the primary ground of responsibility to another for injury; and proximate cause and foreseeability represent attempts to measure fault. In most cases the focus is directed on the kind of conduct which is claimed to have been injurious, and the jury is called upon to determine, upon varying evidence, what the nature of the conduct really was, and whether the injury really was sustained as a result of the conduct.<sup>25</sup>

Taking a step by step analysis, he observed that:

The decisions in other cases serve only as examples of the process whereby the concept of proximate cause is applied. The doctrinal sweep is so broad that a flexibility of approach, almost intuitive in nature, must be used. Some helpful guidelines emerge, not as overarching principles, but simply as tools of analysis:

1). The test of status—is there an existing legal relationship between the parties? In this case, the relationship of landlord-tenant, with the concomitant statutory overlay (see Multiple

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22. *Id.* at 283, 415 N.Y.S.2d at 247 (Hopkins, J., dissenting) (citations omitted).

23. *Economico v. Village of Pelham*, 50 N.Y.2d 120, 405 N.E.2d 694, 428 N.Y.S.2d 213 (1980).

24. *Pagan v. Goldberger*, 51 A.D.2d 508, 382 N.Y.S.2d 549 (2d Dep't 1976).

25. *Id.* at 509, 382 N.Y.S.2d at 550.

Dwelling Law § 78) is present.

2). The test of temporal duration - is the occurrence of the injury tied to the claimed negligent act or omission within a reasonable lapse of time? In this case, the asserted negligent condition had endured an appreciable length of time, and it could be found that the injury occurred immediately upon contact with the condition.

3). The test of spatial relation - is the occurrence of the injury close or far in distance from the point of the claimed negligent act or omission? In this case, the injured infant plaintiff was found touching the asserted negligent condition.

4). The test of foreseeability - is the claimed negligent act or omission reasonably predictable as a cause of the occurrence of the injury? In this case, the defendant was apprised of the presence of a small child in the household and had notice of the asserted negligent condition.

5). The test of public policy - is there an identifiable policy which either protects the victim of the injury or forbids liability for the injury? In this case, the interests or public policy are embodied in the statutory command that a landlord of a multiple dwelling should maintain the premises in good repair (Multiple Dwelling Law § 78).<sup>26</sup>

#### F. *Discussion of Liens - Public and Private*

In *Paerdegat Boat and Racquet Club, Inc. v. Zarrelli*,<sup>27</sup> special term had discharged the public improvement lien, and on the theory that a mechanic's lien may not attach to city-owned property or to the improvements erected thereon, also discharged the mechanic's lien. All five appellate judges agreed that the public improvement lien should be discharged. The controversy revolved around the question posed by the majority: "can [real] property owned by a municipal corporation and leased to a private entity for private purposes validly be encumbered by a mechanic's lien to the extent of the leasehold interest?"<sup>28</sup>

In a three-to-two decision, Judges Hopkins and Rabin dissented, answering the question in the affirmative. Taking up the cudgel for the dissenters, Hopkins said:

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26. *Id.* at 511-12, 382 N.Y.S.2d at 552.

27. *Paerdegat Boat & Racquet club, Inc. v. Zarrelli*, 83 A.D.2d 444, 445 N.Y.S.2d 162 (2d Dep't 1981), *rev'd*, 57 N.Y.2d 966, 443 N.E.2d 477, 457 N.Y.S.2d 229 (1982).

28. *Id.* at 446, 445 N.Y.S.2d at 164.

The statute differentiates between private liens and public liens (e.g., compare Lien Law, § 3 with Lien Law, § 5), and the question before us is whether it sanctions the filing of a private lien against the interest of Paerdegat under a lease of property owned by the City of New York. We would expect that in such an important matter the statute would be clear and explicit in authorizing such filing. It is not, and the statutory language, properly construed, leads to the contrary conclusion.

Turning to the statutory definitions—which are the foundation of the rights created by liens—we find that “‘real property,’ when used in this chapter, includes real estate, lands, tenements and hereditaments, corporeal and incorporeal . . . and the right of franchise granted by a public corporation for the use of the streets or public places thereof, and all structures placed thereon for the use of such right or franchise” (Lien Law, § 2, subd. 2). A “‘public corporation,’ when used in this chapter, means a municipal corporation” (Lien Law, § 2, subd. 6). The definition of real property does not include any such property of a public corporation, except a franchise granted by it. Hence, the definition negatives any scope for a private lien against a lease of municipal property. Even more tellingly, the statute does not expressly or implicitly distinguish between lease of municipal property used for public purposes and lease of municipal property used for non-public purposes.

. . . .

The reasons for the substitution of the funds of the municipal corporation in place of its real property were early delineated. It was recognized that public property, if subject to lien and the threat of foreclosure, would be intolerably burdened and harassed, that public property was traditionally immune from execution and seizure, and that the comfort and safety of the public might be interrupted or destroyed. These grounds of public policy have been consistently observed by later cases.

As I understand the position of the majority, the force of these precedents is acknowledged, but a further gloss is introduced in the rule by making its application depend on whether the use of the property is devoted to public purpose. I do not perceive in the cases any distinction related to that test; indeed, the latest precedent in our court and affirmed by the Court of Appeals rejects the basis for such a distinction.

. . . .

I therefore vote to affirm the order.<sup>29</sup>

The cases noted above serve to illustrate what Justice Cardozo, in his learned treatise *Law and Literature*, wrote on the subject of opinions:

Classification must be provisional, for forms run into one another. As I search the archives of my memory, I seem to discern six types or methods which divide themselves from one another with measurable distinctness. There is the type magisterial or imperative; the type laconic or sententious; the type conversational or homely; the type refined or artificial, smelling of the lamp, verging at times upon preciousness or euphuism; the type demonstrative or persuasive; and finally the type tonsorial or agglutinative, so called from the shears and the pastepot which are its implements and emblem.<sup>30</sup>

Were it not for the circumstance that he was on an intermediate rather than the highest court, I would unhesitatingly suggest that Judge Hopkins' writings could qualify as magisterial or imperative. Cardozo said of such writing:

It eschews ornament. It is meager in illustration and analogy. If it argues, it does so with the downward rush and overwhelming conviction of the syllogism, seldom with tentative gropings towards the inductive apprehension of a truth imperfectly discerned. We hear the voice of the law speaking by its consecrated ministers with the calmness and assurance that are born of a sense of mastery and power.<sup>31</sup>

Faced as we are with the intermediate status of the appellate division, however, we must place Judge Hopkins into the type characterized as demonstrative or persuasive. For certainly in the exchange of opinion and argument with us, his fellows, he convinced many an undecided colleague to go his way, and his opinions follow syllogistic and analytical lines.

## II. The Judge as a Person

While on the bench, Jim Hopkins was held in high admiration and esteem by his colleagues. Never one to push himself

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29. *Id.* at 449-52, 445 N.Y.S.2d at 166-68 (Hopkins, J., dissenting).

30. B. CARDOZO, *LAW AND LITERATURE* 9-10 (1931).

31. *Id.* at 10.

forward, he was at all times ready and willing to help anyone in any problem presented, and would go out of his way to be of assistance. It was a delight to watch him preside at the court sittings. Except in the few instances when he might be sitting on a panel with the presiding justice, he was, by virtue of his senior status, the justice presiding whenever he sat. He seldom made positive statements to the attorneys appearing before the court. Rather, he would pose sticky questions, using what may be termed the Socratic method. His approach served to put the attorneys on their mettle in trying to respond to his queries.

Well might it be asked, upon what meat does this our colleague feed that he is grown so great? Every step in his career appeared to point towards the ultimate goals of high achievement, the respect and esteem of his fellows, and a permanent position in the legal history of our state.

Born in March 1911 in Westchester County, he graduated from Columbia College in 1931 at the age of twenty, from the law school in 1933, and was admitted to the bar in 1934. He entered private practice upon admission and at the same time applied himself to public and governmental endeavors. In fairly rapid succession, he was a Town Councilman in North Castle, from 1939 to 1943, then its Supervisor for five two-year terms from 1944 to 1953, and Chairman of the Board of Supervisors in his final term. Thereafter he served as Westchester County Executive for four years. Switching from the legislative and executive branches of government, he ran for and was elected County Judge in the fall of 1957. He is the only person to have served in all three branches of Westchester County government.

His term as County Judge was curtailed when in 1960 Governor Rockefeller appointed Jim Hopkins to the supreme court bench for the ninth judicial district, which embraces the counties of Westchester, Dutchess, Putnam, Rockland, and Orange. That same year, Jim was elected to a fourteen year term. He had scarcely settled himself comfortably on the supreme court bench when he was again elevated by Governor Rockefeller, this time to the appellate division, where he served until his recent retirement, as above noted.

In his multifarious activities, he has out-beavered the beaver, serving as he has on faculties of judicial seminars, as the author of many and varied law review articles, and in traveling

nationwide to attend and to speak at judicial functions.

The record of his opinions that were reviewed favorably by the court of appeals verges on the incredible. One might well imagine that the high court kept a series of rubber stamps variously inscribed: "affirmed" or "reversed" or "modified" "on the opinion/dissenting opinion of Mr. Justice James D. Hopkins at the appellate division." Three recent court of appeals decisions were so labeled.

In *Marcus v. Baron*, the remittitur read "[o]rder reversed . . . and judgment of Supreme Court, Rockland County, reinstated for reasons stated in the dissenting opinion of former Justice James D. Hopkins at the Appellate Division."<sup>32</sup> *Paerdegat Boat and Racquet Club, Inc. v. Zarrelli* came down with the notation: "[o]rder reversed . . . and the mechanic's lien discharged for reasons stated in the concurring in part and dissenting in part opinion by former Justice James D. Hopkins at the Appellate Division."<sup>33</sup> *Safeco Insurance Co. of America v. Jamaica Water Supply Co.* read "[o]rder affirmed . . . for reasons stated in the opinion by former Justice James D. Hopkins at the Appellate Division."<sup>34</sup>

Most recently, he collaborated with Robert MacCrate, former counsel to Governor Rockefeller and immediate past president of the American Judicature Society, and Professor Maurice Rosenberg of Columbia University Law School to study appellate justice at the request of the court of appeals. The result is a 195-page treatise entitled *Appellate Justice in New York*, which, in all likelihood,<sup>35</sup> will effect some important changes in procedures and in substance in the state courts.

His writings are models of keenness of discernment, lucidity of expression and, where called for, are terse and concise. Unlike

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32. *Marcus v. Baron*, 57 N.Y.2d 862, 864-65, 442 N.E.2d 437, 437, 456 N.Y.S.2d 39, 39 (1982), *rev'g* 84 A.D.2d 118, 445 N.Y.S.2d 587 (2d Dep't 1981).

33. *Paerdegat Boat & Racquet Club, Inc. v. Zarrelli*, 57 N.Y.2d 966, 968, 443 N.E.2d 477, 478, 457 N.Y.S.2d 229, 230 (1982), *rev'g* 83 A.D.2d 444, 445 N.Y.S.2d 162 (2d Dep't 1981). For a discussion of this case at the appellate division level, *see supra* text accompanying notes 27-29.

34. *Safeco Ins. Co. of Am. v. Jamaica Water Supply Co.*, 57 N.Y.2d 994, 996, 443 N.E.2d 493, 493, 457 N.Y.S.2d 245, 245 (1982), *aff'g* 83 A.D.2d 427, 444 N.Y.S.2d 925 (2d Dep't 1981).

35. R. MACCRATE, J. HOPKINS & M. ROSENBERG, *APPELLATE JUSTICE IN NEW YORK* (1982).



some appellate effusions which are paradigms of tortuous anfractuositities, his are readable and understandable at first try. One might use a quatrain by James Russell Lowell to illustrate this thought:

His words were simple words enough,  
And yet he used them so,  
That what in other mouths was rough,  
In his seemed musical and low.<sup>36</sup>

As a final remark, and a personal one, I conclude by saying, Jim, it has been a privilege to know you and to have served with you in Brooklyn. May you and your lovely and loving wife, Bert, enjoy a happy and well deserved retirement. *Ad multos annos*, good luck and God Bless.

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36. The quatrain is from *The Shepard of King Admetus*, by James Russell Lowell.